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Issue Date: 11 April 2003

In the Matter of

LANCE E. CLARK
Claimant

Case No.: 2001 LHC 3059

v.

BATH IRON WORKS
Employer

OWCP No.: 01-151369

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

Appearances:

Ms. Marcia J. Cleveland, Attorney
For the Claimant

Mr. Stephen Hessert, Attorney
For the Employer

Before:

Richard T. Stansell-Gamm
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

This case involves a claim filed by Mr. Lance E. Clark for benefits and medical treatment under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 - 950, as amended ("the Act"). The claim stems from an alleged work-related cumulative injury to Mr. Clark's right knee.

On August 20, 2001, the District Director forwarded to the Office of Administrative Law Judges the pre-hearing statements filed by the Claimant's counsel. Pursuant to a Notice of Hearing, dated November 13, 2001 (ALJ I),[1] I conducted a formal hearing on March 13, 2002 in Portland, Maine, attended by Mr. Clark, Ms. Cleveland, and Mr. Hessert. My decision in this case is based on

[1] The following notations appear in this decision to identify specific evidence and other documents: ALJ - Administrative Law Judge exhibit, CX - Claimant exhibit, EX - Employer exhibit, and TR - Transcript of hearing.

the testimony presented at the hearing and all the documents admitted into evidence: CX 1 to CX 13 and EX 1 to EX 22.[2]

Issues

1. Timely notice of injury.

2. Whether Mr. Clark has a work-related injury to his right knee.

3. Nature and extent of disability.[3]

Parties' Positions

Claimant[4]

Mr. Clark began working in the shipyards in 1988 as a shipfitter. In that capacity, he had to perform repetitive crawling and kneeling a significant portion of the work day. He first experience left knee pain in 1991 and had corrective surgery on that knee in 1999. In a similar manner, Mr. Clark's right knee started bothering him in 1992 and he experienced effusion in that knee in 1995.

On August 28, 2000 Mr. Clark went out on strike. A few days later, on September 3, 2000, while walking on his lawn, his right knee gave way causing him to stumble but not fall. Dr. Eriksson, who had treated Mr. Clark's knee problems since 1991 and attributed his condition to his work conditions, determined through an MRI that Mr. Clark had suffered a tear of his medial meniscus. Dr. Eriksson performed corrective surgery on the right knee on May 17, 2001, concluded Mr. Clark's right knee condition had become permanent by July 30, 2001, and has consistently opined the knee problems are related to Mr. Clark's work.

Based on these circumstances, Mr. Clark has established a sufficient *prima facie* case to invoke the causation presumption under Section 20(a). Dr. Eriksson attributes Mr. Clark's right knee

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[2]As permitted in the hearing (TR, pages 10, 21, 31 and 32), I received post-hearing Dr. Brigham's April 10, 2002 deposition, an April 2, 2002 medical report by Dr. Brigham, and a May 21, 2002 deposition of Mr. Memana Abraham. I have marked these exhibits EX 20, EX 21, and EX 22, respectively. Absent any post-hearing objection, I now admit EX 20 to EX 22 into evidence. I also provided Ms. Cleveland an opportunity to depose Dr. Eriksson, the treating physician, post hearing (TR, page 30). That deposition never occurred and I received nothing else from Ms. Cleveland concerning Dr. Eriksson.

[3]I need not address medical benefits since Mr. Hessert represented at the hearing that if Mr. Clark's right knee condition is work-related, the Employer will provide appropriate medical benefits and reimbursement for his right knee surgery. According to Mr. Hessert, the Employer does not contest the reasonableness or necessity of the right knee medical treatments (TR, pages 35 and 36).

[4]Post-hearing brief, dated July 15, 2002 and hearing presentation (TR, pages 11 to 15, and 32 to 34).

condition to years of wear at work. She points out that Mr. Clark experienced the same sequence of events with his left knee. Even Dr. Brigham agrees that Mr. Clark's years of crawling and kneeling were capable of causing degenerative changes to the knees.

The Employer has failed to rebut the presumption because Dr. Brigham indicates that the medial tear was just as likely to have been caused at home. He also admits being unable to determine whether Mr. Clark's working conditions were a contributing factor.

Additionally, even if Dr. Brigham's opinion were deemed sufficient to rebut the presumption, the preponderance of the more probative medical evidence establishes the requisite work-related connection. As Mr. Clark's long-term treating physician, Dr. Eriksson is best situated to provide a probative medical opinion. Although she doesn't address when the meniscus tear may have occurred, Dr. Eriksson clearly considers the right knee damage work-related.

After Mr. Clark returned to work following the strike, he was assigned to a leader who did not accommodate his knee problems like his former leader had done. Subsequently, due to multiple physical problems, Mr. Clark had to stop work and is totally disabled due to the cumulative effect of all his disabilities. The Employer provided compensation benefits for Mr. Clark's shoulder problem until the company deemed he was recovered in April 2001. However, since the Employer did not accomplish a labor market survey until February 2002, Mr. Clark has been totally disabled at least through that date. Further, the labor market expert's reliance on average salaries rather than specific wages renders his opinion inadequate.

Mr. Clark's notice of injury is timely because he informed the Employer on September 3, 2000 that he thought his knee going out was related to his work, well within thirty days from when he last worked on August 25, 2000. Consequently, the Employer had sufficient notice.

Due to his cumulative right knee injury, and its uncertain condition, Mr. Clark is entitled to temporary total disability from April 17, 2001, and continuing,[5] and associated medical benefits, including reimbursement of $1,100 for the corrective surgery on the right knee. The appropriate average weekly wage is $713.13.

Employer[6]

The Employer's response consists of three elements. First, Mr. Clark's right knee condition is not work-related. Second, he did not present timely notice of his claim. And, third, if Mr. Clark's right knee condition is work-related, he is entitled to only permanent partial disability compensation

[5]Ms. Cleveland candidly acknowledged that Mr. Clark was not asserting his current right knee condition would preclude his return to working some job (TR, page 25). However, a significant collateral effect to any determination of disability entitlement under the Act would be Mr. Clark's eligibility for retraining through the U.S. Department of Labor (TR, page 26).

[6]Post-hearing brief, dated July 15, 2002 and hearing presentation (TR, pages 15 to 20).

based on the Section 8 schedule.

If Mr. Clark is able to invoke the causation presumption under Section 20 (a), substantial evidence exists to rebut that presumption. In particular, following Mr. Clark's May 1999 left knee surgery, his lead man did not assign him arduous work and effectively reduced the incidence of having to crawl to about 10% of the time. Also, between May 1999 and August 25, 2000, Mr. Clark made no complaints about right knee injuries or problems. Further, and importantly, Dr. Brigham's medical opinion provides sufficient evidence to rebut the causation presumption.

In the absence of the presumption, Mr. Clark must prove that his right knee condition is work-related by the preponderance of the evidence. To meet that burden, he relies in part on his own testimony. However, due to varying answers and changes in testimony, his credibility is questionable. Mr. Clark's reliance on Dr. Eriksson is also insufficient because the physician based her opinions about the relationship between Mr. Clark's work and his right knee condition on an inaccurate history of his most recent work.

Although Mr. Clark may not be able to return to his prior job as a shipfitter due to his knee condition, he remains employable and Dr. Eriksson has released him to return to work. The labor market survey and its author have demonstrated the existence of suitable alternative employment for Mr. Clark. As a result, his impairment is not total.

Mr. Clark did not give the Employer the requisite notice of injury within thirty days of the injury. Certainly, by September 6, 2000, after seeing Dr. Eriksson, Mr. Clark believed his right knee condition might be related to his employment. However, he did not file a notice of claim until November 28, 2000. Mr. Clark asserts he called the company about the injury in September 2000, but the first company record shows November 2000. Since Mr. Clark's testimony is questionable, his statement, standing alone, does not prove timely notice. The Employer has been prejudiced by this delayed notice because as time progresses it becomes more difficult to ascertain the cause of Mr. Clark's right knee condition.

Because Mr. Clark's right knee condition is permanent, he has reached maximum medical improvement and suffers only a permanent partial disability associated with his right knee. According to Dr. Brigham, that degree of that disability is 2%. As a result, Mr. Clark is only entitled to 5.76 weeks of permanent partial disability compensation.

SUMMARY OF EVIDENCE

While I have read and considered all the evidence presented, I will only summarize below the information potentially relevant in addressing the issues.

Sworn Testimony

Mr. Lance Clark

TR, pages 37 to 90

[Direct Examination] Mr. Clark started working at Bath Iron Works ("BIW") on July 5, 1988 as a shipfitter. He spent his entire shipfitter career at BIW and stopped working n November 3, 2000. As a shipfitter, Mr. Clark was required to work "pretty much anywhere on the ship," both inside and outside the hull. He spent at least five years working in the tanks of ships. The tanks are used to store water, fuel and "other stuff." Most tanks are 10 by 10 feet and about 20 feet high. In smaller tanks, you can't stand up. "It's hard, dirty work." In the stern section, you have to crawl under the propeller shaft or tube, with a diameter of about 4 feet, from the outside to reach the stern tanks. The workers move along the propeller shaft by "scooching over," bent at the waist and crawling. Many tanks have access manholes about 2 feet by 2 feet. Mr. Clark spent about 50% of his time in small tanks and tubes where he couldn't stand up. Sometimes, he had to work on his knees. On occasions, when he was helping erection crews working on bulkheads, Mr. Clark would have to kneel down to make some of the connections. Working with an erection crew, Mr. Clark spent 90% of his time on his knees. The stern work required about 40 to 50% of his time on his knees.

Mr. Clark started having problems with his knees in 1992. At first, his left knee was the problem but both knees were achy. On Sunday, September 3, 2000, while at a friend's house, Mr. Clark's right knee gave way. The following Monday or Tuesday, he called Mr. Ross Nadeau at BIW. Mr. Nadeau is the workers' compensation adjuster at BIW. Based on his past experience with his left knee, Mr. Clark explained that his right knee popped out on September 3, 2000 and he indicated that it had been bothering him. Mr. Clark asked Mr. Nadeau whether BIW would cover a trip to a physician concerning his popped out right knee. Mr. Nadeau gave Mr. Clark September 3, 2000 as the date of the injury.

At the time his right knee gave way, Mr. Clark was out on strike and returned to work about two weeks before he was "put out" on November 3, 2000. During the first week , Mr. Clark worked the stern crew. However, his lead man knew about his knee problem and gave him assignments that didn't irritate his knee. In the next week, Mr. Clark moved to the second shift and spent the time gouging and grinding. He was able to do those jobs. On November 3, 2000, Mr. Clark brought in his work limitations from Dr. Synder and Dr. Eriksson based on carpel tunnel problems. In response, BIW said they had no work for him and he had to go home.

On December 18, 2000, Mr. Clark had corrective surgery for carpel tunnel in his right hand. In February 2001, he had additional surgery on his left hand. Mr. Clark was out of work due to those surgeries. After a hesitant start, Mr. Clark received workers' compensation until about April 17, 2001.

Mr. Clark had corrective surgery on his right knee in May 2001. Following the procedure, sometime in July or August, the physician gave Mr. Clark a modified duty release. He presented that information to BIW and was eventually put on a list of people with physical problems to be called if anything came up. To date, BIW has not called him back to work.

Mr. Clark's physical limitations, as of February 4, 2002, as established by Dr. Eriksson and sent to BIW, include no repetitive overhead lifting due to tendinitis in his shoulder, no repetitive bending due to his back, and no crawling, crouching, or kneeling. Any limitations associated with his carpel tunnel stopped in October or November 2001.

Mr. Clark would like to return to work at BIW within his physical limitations. He attempted to get retraining through DOL but was unable to get it because he wasn't receiving workers' compensation. Instead, he's attempted to sign up for other types of retraining.

Mr. Clark is available to work every other weekend. In the couple of days that he had the labor market survey, Mr. Clark attempted to contact the five employers listed in the labor market survey. One employer informed him that the hiring process was slow at the present time. Another employer did not have positions in his store. Other employers haven't returned his phone calls. Mr. Clark only has some of the injuries listed on the labor market survey. Although he does struggle with shoulder dysfunction and low back pain, Mr. Clark no longer has any problems with carpel tunnel syndrome.

[Cross examination] Mr. Clark is 37 years old and graduated from high school. Prior to working for BIW, Mr. Clark served four years in the Army as an interior electrician. After an honorable discharge, he worked two years in road construction. He received eight weeks of electrician training in the Army.

Mr. Clark acquired his shipfitter skills while working at BIW. He was trained in certain areas, such as welding. Mr. Clark went out of work on August 25, 2000 when the union voted to strike. In the several weeks before the strike, from about June 2000, Mr. Clark did not see any doctor about problems in his right knee. Likewise, he did not seek any first aid treatment for the right knee. During this period, he was doing light duty as a shipfitter. He had light duty due to his shoulder and prior knee problems. However, Mr. Clark did not have any medical restrictions due to his right knee. Likewise, despite prior surgeries, Mr. Clark also did not have any medical restrictions due to his left knee. In other words, in the short term period before the strike, Mr. Clark was under no restrictions due to either knee. At the same time, Mr. Clark explained that his lead man, who he had worked with for five years, knew that if Mr. Clark had any restriction after his left knee surgery, he would not be able to work. Mr. Clark told him about the knee problem and he was assigned burning which didn't require a lot of kneeling and crawling. This change in work profile came in May 1999 after his second left knee surgery. In other words, he wasn't doing the same amount of kneeling. Instead, he was crawling and kneeling only about 10% of the time.

On September 3, 2000, after the right knee gave way as he was walking across a lawn, it swelled up. Mr. Clark tried to call Dr. Eriksson, but she was on vacation. Her office told him to ice the knee and be careful. He did not get to see Dr. Eriksson until the end of September or beginning of October. Mr. Clark has experienced problems with both knees during his time with BIW. When he called Dr. Eriksson, he believed his right knee condition was related to his work.

Between the time he no longer worked for BIW and his phone calls to employers listed on the labor market survey a week or so before the hearing, Mr. Clark did not seek employment with anyone else other than BIW. In regards to his contacts with the five employers, Mr. Clark did turn in an application to one employer. Mr. Clark has been receiving some short-term disability insurance since April 2001.

When he first visited Dr. Brigham, the physician asked him about his daily activities. Mr. Clark didn't answer those questions. He last saw Dr. Eriksson in February 2002 and doesn't have any plan for additional treatment.

[Redirect examination] In the past, when Mr. Clark went to BIW First Aid for help with his left knee, he was informed that he needed to contact his own physician about the problem since he already had surgery on the knee. So when his right knee started bothering him, he didn't go to BIW First Aid for help. Instead, he was waiting for the knee to become bad enough to see a doctor. In the three months prior to August 25, 2000, Mr. Clark did have right knee problems.

On September 3, 2000, when his knee gave out, Mr. Clark stumbled but did not fall.

After his left knee surgery, even though the amount of crawling at work diminished, Mr. Clark still had to do a lot of climbing with heavy loads which strained his knees. He did not have to kneel on his knees.

[ALJ examination] Mr. Clark graduated from high school in 1982. In the road construction job, Mr. Clark was a general laborer, laying pipe. Within four years of working at BIW, Mr. Clark had problems with his knees, which Dr. Eriksson thought was bursitis. He saw Dr. Eriksson in 1992 based on a referral by a family physician. He had not fallen at work, but Mr. Clark did "smash" his knees a "bunch of times at work." He first reported a knee problem to BIW in 1992.

Because Mr. Clark's left knee kept locking up, he decided to have surgery in 1999. When the knee locked up at work, he'd report the problem to First Aid. After the surgery, the doctor told Mr. Clark that he shouldn't be doing a lot of kneeling or crawling because of the two surgeries to the left knee. However, the physician did not pass on that restriction to BIW because they would have put him out of work. Mr. Clark did tell his boss about the knee limitation. He continued working at BIW with the hope they would find something suitable for him. He was able to carry on because his lead man gave him a break on duties.

After the right knee gave out and it started swelling, Mr. Clark knew something was wrong. When he returned to work after the strike, his right knee was still sore. In the first week, the lead man continued to give him a break. When he was placed on the second shift, the work involved mostly with erection and requiring extensive kneeling. However, the new lead man didn't require him to do that type of work; instead Mr. Clark did gouging and grinding which didn't involve kneeling. He was forced off work by a BIW official who said they didn't have any work for him based in his physical limitation relating to his shoulder, knees and carpel tunnel. He had seen neurologists about

his hands in 1998 and 2000. In 1998, they said he had carpal tunnel but did not impose any restrictions. After he saw a doctor in November 2000 for his carpal tunnel, the doctor imposed work restrictions. When BIW became aware of those work restrictions, they let him go. Although Mr. Clark has experienced numbness in his back, he did not receive any work limitations for that problem.

Mr. Clark called BIW in September 2000 to see is his right knee would be covered by the company if he went to see a doctor. Mr. Nadeau said no.

After his May 17, 2001 right knee surgery, Dr. Eriksson placed him on modified duty. He didn't pursue other work because he was trying to get retraining with DOL and approached another company.

Documentary Evidence

Notice of Injury, LS-201
CX 1 and EX 1

Mr. Clark completed a Notice of Injury, LS -201 on November 28, 2000, asserting that he had suffered a right knee injury due to repetitive kneeling, crawling and climbing. For the date of injury, Mr. Clark indicated "gradual to August 25, 2000." He claimed to have been out of work due to this injury since November 3, 2000.

Compensation Claim, LS-203
CX 2 and EX 2

On November 28, 2000, Mr. Clark completed a compensation claim for the right knee injury.

Employer's First Report of Injury, LS-202
CX 3 and EX 4

On December 4, 2000, Mr. Nadeau completed the Employer's First Report of Injury related to Mr. Clark's claimed right knee injury. The Employer first became aware of the injury on November 29. 2000. Mr. Clark's normal duties included repetitive motion work.

Notice of Controversion, LS - 207
CX 4

On October 2, 2000, Mr. Ross Nadeau completed a Notice of Controversion indicating that the Employer, Bath Iron Works, controverted Mr. Clark's right to compensation for right knee pain for several reasons, including coverage, statute of limitations, causation, and extent of disability. Mr. Nadeau listed the date of injury as September 3, 2000 and indicated the Employer's first knowledge of the injury occurred on September 29, 2000.

Notice of Controversion, LS - 207
EX 3

On December 4, 2000, Mr. Ross Nadeua completed a Notice of Controversion indicating that the Employer, Bath Iron Works, controverted Mr. Clark's right to compensation for right knee pain for several reasons, including coverage, statute of limitations, causation, and extent of disability. Mr. Nadeau listed the date of injury as August 25, 2000 and indicated the Employer's first knowledge of the injury occurred on December 4, 2000.

Dr. Ann Ingrid Eriksson
CX 8, CX 9, CX 11, EX 10, and EX 20

Dr. Eriksson, board certified in orthopaedic surgery,[7] noted on December 5, 1991, that Mr. Clark had been struggling with problems in his knees for the last 10 months without any specific trauma. He occasionally bumped his knees at work. He also engaged in heavy lifting, climbing and frequent kneeling. Upon examination, his knees had full range of motion and no swelling was present. Dr. Eriksson prescribed Advil and inserts. On a form to BIW, Dr. Eriksson opined the knee pain was work-related due to Mr. Clark's lifting and kneeling. However, she released him to return to work without limitations. A follow-on examination in February 1992 repeated the findings and prescription.

On April 24, 1995, Mr. Clark suffered an injury to his right knee which caused some effusion. Dr. Eriksson indicated he could return to work on May 6, 1995.

On January 18, 1999,*[8] Mr. Clark reported to Dr. Eriksson that for the prior two weeks, he had experienced problems with his left knee locking up. He also reported about a month and a half earlier, he had slipped at work and injured his medial collateral ligament area of his left knee. Dr. Eriksson suggested a possible meniscal tear.

On February 5, 1999,* an x-ray disclosed a complete oblique tear near the midline apex posterior horn medial meniscus of the left knee and small joint effusion. Subsequently, on February 12, 1999,* Dr.

[7] I take judicial notice of Dr. Eriksson's board certification and have attached the certification documentation.

[8] I obtained the information about most of Dr. Eriksson's medical treatment notes for the period January 1999 to May 1999 from Dr. Brigham's summarization of Mr. Clark's medical record contained as an attachment to his deposition (EX 20). Based on my review of Dr. Brigham's summarization of other portions of Dr. Eriksson's treatment notes which I have also directly reviewed, I have confidence in the accuracy of his summarization and marked these entries with an "*".

Eriksson diagnosed a medial meniscus tear.

On March 18, 1999,* Mr. Clark underwent arthrosporic surgery on his left knee.

On April 9, 1999, Dr. Eriksson imposed a no kneeling restriction.

On May 11, 1999,* Mr. Clark reported that his left knee was locking up again, so Dr. Eriksson accomplished a second arthrosporic procedure on the left knee for a torn posterior horn medial meniscus tear. She partial removed the medial meniscus.

Stating that his right knee had popped and given way, Mr. Clark came to Dr. Eriksson on September 6, 2000. Dr. Eriksson reported a medical history which established that Mr. Clark's left knee had displayed similar symptoms which eventually led to corrective knee surgery. Dr. Eriksson prescribed ice, a brace and Advil. She commented, "I suspect that the derangement is work related."

In a follow-up examination on September 27, 2000, Mr. Clark complained that his right knee was catchy, painful, and occasionally stiff. Upon examination of the right knee, Dr. Eriksson found major tenderness. She repeated Mr. Clark's prior left knee experience which led to arthrosporic surgery for a medial meniscus tear. Dr. Eriksson ordered an MRI. She also reported to the BIW Health Department her diagnosis of right knee derangement with a date of injury of September 3, 2000. Dr. Eriksson annotated that the problem was work-related.

On November 1, 2000, Dr. Eriksson noted that the significant swelling of the right knee had partially resolved. Mr. Clark reported that in his work he is often crawling and kneeling. Due to this work, he believed his right knee had been damaged in a manner similar to his left knee. Mr. Clark continued to experience swelling and popping in the right knee. He couldn't kneel or squat due to the discomfort. Dr. Eriksson reported that an October 12, 2000 MRI had disclosed: non-displaced fracture associated with bone marrow edema; moderately large joint effusion; and meniscal tear at the posterior horn of the medial meniscus. Upon physical examination of the right knee, she observed some range of motion limitations, swelling and tenderness. Dr. Eriksson diagnosed osteochondral defect and torn posterior horn medial meniscus. With a check mark on a status report, she informed BIW Health Department that Mr. Clark's right knee derangement was work-related. Dr. Eriksson also placed him on modified duty, restricting Mr. Clark from kneeling, squatting, or crawling. On the same document, which the BIW Health Department received on November 2, 2000, Dr. Eriksson noted Mr. Clark had numbness in his hands and must work with wrist splints.

On November 6, 2000, Dr. Eriksson indicated to BIW that Mr. Clark had to wear wrist splints and could not use vibratory tools.

On November 22, 2000 Dr. Eriksson rendered a diagnosis of right knee derangement and a planned treatment involving arthroscopy. She placed Mr. Clark on modified duty with no kneeling, crawling, or squatting.

Between November 29, 2000 and February 28, 2001, Dr. Eriksson periodically informed the BIW Health Department that Mr. Clark was suffering from carpal tunnel. She imposed no work for both hands through February 28, 2001. After that date, Dr. Eriksson indicated Mr. Clark would be out of work due to his left hand for one more month.

On April 18, 2001, Dr. Eriksson reported that conservative treatment of the right knee had not been successful. Consequently, she planned right knee arthroscopy. A week later, on a UNUM physical capacity form, Dr. Eriksson stated Mr. Clark could not stoop, kneel, crawl, crawl, or climb. About this time, she also informed BIW Health Department that due to his back pain, shoulder pain, wrist problems and right knee derangement, Mr. Clark did not have any work capacity.

On May 17, 2001, Dr. Eriksson performed arthroscopy on Mr. Clark's right knee. In her pre-operation notes, Dr. Eriksson reviewed Mr. Clark's right knee problems, indicated the knee was stable and not swollen, and stated he was a shipfitter who was disabled at this point. During the operation, Dr. Eriksson found a torn posterior horn of medial meniscus. She repaired the damage by trimming and removed loose fragments.

By the time of his May 23, 2001 visit with Dr. Eriksson, Mr. Clark was "post right knee arthroscopy." Physical examination disclosed a benign knee with only slight swelling. She indicated Mr. Clark would soon enter physical therapy. She informed the BIW Health Department that Mr. Clark was entering physical therapy and could not work.

Following a June 13, 2001 examination, Dr. Eriksson informed the BIW Health Department Mr. Clark was still in physical therapy. He was not allowed to kneel or crawl and could only stand two hours at a time.

On July 30, 2001, Dr. Eriksson discussed Mr. Clark's various physical ailments and his return to work. Concerning the knees, she stated "his derangements are permanent." According to Dr. Eriksson, Mr. Clark could work light duty with some restrictions. As she informed the BIW Health Department, he could not crawl or kneel. Additionally, he was restricted from overhead lifting, bending at the waist and using his hands for repetitive work. On the form to the BIW Health Department, Dr. Eriksson annotated that Mr. Clark had reached maximum medical improvement. At the same time, she did not anticipate a permanent impairment.

After a September 24, 2001 office visit, observing Mr. Clark still had back, shoulder, and hand problems, Dr. Eriksson concluded Mr. Clark had reached maximum medical improvement. However, Dr. Eriksson did not render an opinion on the degree of disability associated with Mr. Clark's right knee. She continued to impose work restrictions. On the BIW Health Department form, Dr. Eriksson annotated that Mr. Clark had reached maximum medical improvement and she believed his physical problems with his back, shoulder, carpal tunnel and right knee were permanent and work-related. Mr. Clark was still restricted from kneeling or crawling.

In the office note for December 12, 2001, Dr. Eriksson annotated his condition was

unchanged and presented the same information to BIW. At that time, Mr. Clark asked that she remove some of his restrictions placed on him for his carpal tunnel condition.

Following a February 4, 2002 examination, Dr. Eriksson informed BIW that Mr. Clark's permanent physical problems were work-related. He was released to modified duty without any crawling, kneeling, stooping, over-the-shoulders movement, and repetitive hand use.

Stephens Memorial Hospital Records
CX 9

On October 12, 2000, Dr. Villedrouin interpreted an MRI of Mr. Clark's right knee. In the study, he observed moderately large effusion in the joint, the possibility of a non-displaced fracture, a tear on the inferior surface of the meniscus and changes in the body and horn of the meniscus.

Between June 5 and July 10, 2001, Mr. Clark had ten physical therapy sessions to increase strength and range of motion in his right knee. At the conclusion of the program, Mr. Clark reported he still couldn't kneel and had problems standing for more than one hour. The therapist noted minimal swelling and full strength in the knee.

BIW Health Department Records
CX 11, CX 12, EX 12, and EX 13

On November 8 and November 11, 1991, Mr. Clark complained to the Health Department that for the last several months he was experiencing pain in both knees, especially when kneeling. The pain in the left knee was worse than the right knee. A previous x-ray of the knees was normal. Mr. Clark expressed his intention to see Dr. Eriksson.

On March 2, 1992, Dr. Bonnie Sendzicki reported treating Mr. Clark for bilateral knee bursitis. She concluded the ailment was work-related due to overuse. Mr. Clark was able to return to work without restrictions.

On May 1, 1995, Mr. Clark complained about pressure in his right knee. He was returned to work with limitations. Mr. Clark was to avoid prolonged walking and climbing. He was not to kneel. A few weeks later, a doctor diagnosed transient effusion in the right knee.

On August 12, 1996, Mr. Clark presented with stiffness in his left knee. He had difficulty kneeling and the examination showed obvious evidence of edema in the left knee.

On August 12, 2000, Mr. Clark reported soreness in his shoulder and numbness in his arms and hands with repetitive overhead work and grinding.

About mid-August 2000, Dr. Bote informed BIW that Mr. Clark was struggling with a sore shoulder, numbness in his legs and numbness in his hands. The physician imposed a work restriction

of no repetitive overhead movement.

A medical case entry, dated September 29, 2000, for Mr. Lance Clark documents his claim that his right knee popped due to years of working on his knees. The diagnosis was right knee pain. The incident date is listed as August 25, 2000.

An October 30, 2000 annotation indicated Mr. Clark could return to work without kneeling through November 1, 2000.

Dr. Ronald E. Synder
EX 11

On November 6, 2000, Dr. Synder, board certified in physical medicine and rehabilitation, examined Mr. Clark concerning his sore shoulder and hand numbness. Mr. Clark indicated that overhead work bothered his shoulder and driving and gripping produced numbness in his hands. Upon examination, Dr. Synder found abnormal median nerves consistent with bilateral carpal tunnel syndrome. He directed Mr. Clark to use wrist splints. According to Dr. Synder, surgery might produce full recovery.

Dr. Christopher R. Brigham
CX 10, EX 14, EX 19, EX 20, and EX 21

Dr. Brigham, board certified in occupational medicine, examined Mr. Clark on January 15, 2002. He reviewed a portion of Mr. Clark's medical record. Mr. Clark had left knee surgery in March 1999 and follow-up surgery for the same knee in June 1999. Mr. Clark's right knee was still going out. He also had problems with his shoulder, low back and carpal tunnel. His occupational history included physical tasks involving his upper extremities, kneeling and crawling 50% of the time. His current work restrictions included no kneeling, squatting, or stooping. Mr. Clark had not worked since November 3, 2000. Dr. Brigham noted a January 12, 2002 x-ray of the knees did not show any abnormalities. The physical examination of the knees revealed normal strength and good stability. Dr. Brigham diagnosed chronic bilateral knee pain, post operative carpal tunnel, chronic shoulder dysfunction, and low back pain. The most significant problem was his knees. Dr. Brigham opined Mr. Clark probably "had underlying degenerative disease involving the meniscui." Mr. Clark had reached maximum medical improvement. Pending additional medical evidence, he deferred an opinion on degree of disability and causation.

Dr. Brigham conducted another evaluation on April 2, 2002. At that time, he obtained a more complete history from Mr. Clark and obtain additional medical records. Describing his work environment, Mr. Clark stated he had engaged in a variety of physical tasks involving both his upper

body and knees. He had spent up to 50% of his time on his knees and crawling. Mr. Clark added that after the May 1999 left knee surgery, his lead man had assigned him to tasks that required less kneeling. Mr. Clark's present physical problems included low back pain, shoulder dysfunction, post-operative carpal tunnel and chronic knee problems. At home, Mr. Clark engaged in light house work and laundry. Upon examination, other than scarring, Mr. Clark's knees appeared unremarkable. He had full range of motion in both knees. A review of the radiographic images of his knees showed a midline tear of the medial meniscus of both knees. Based on this second examination, Dr. Brigham diagnosed: post-operative bilateral mensiscectomies, post-operative carpal tunnel, chronic shoulder dysfunction, shoulder and low back pain. He concluded Mr. Clark's right knee had reached MMI and Mr. Clark could work in an environment that avoided repetitive hand motions, kneeling, crawling and crouching.

Concerning the cause of Mr. Clark's right knee problem, Dr. Brigham initially suspected an underlying degenerative disease. However, the May 17, 2001 right knee operation notes failed to mention any evidence of degenerative changes in the knee. Additionally, "the tear occurred at home; not at the work place" and "his activities were less intensive in terms of his knees during the preceding months." Finally, since Mr. Clark's work is consistent with activity that may cause degenerative joint difficulties, and if Dr. Eriksson had documented such degenerative changes, then Mr. Clark's work activities may have been a contributing cause. However, Dr. Brigham found no documentation in the record that such degenerative changes were present in Mr. Clark's knees. Consequently, Dr. Brigham concluded Mr. Clark's right knee condition was not work-related.

In terms of a disability rating for his right knee, Dr. Brigham opined Mr. Clark had a 2% impairment to his lower extremity due to the partial medial meniscectomy.

In an April 10, 2002 deposition, and after reviewing Mr. Clark's medical record from 1991, Dr. Brigham provided additional information concerning his evaluation of Mr. Clark. He again explained the various reasons for his opinion that Mr. Clark's right knee meniscus tear was unrelated to his work at BIW. Dr. Brigham specifically stated that Mr. Clark's episode of his right knee popping at home is consistent with the manner in which a person may tear the meniscus.

In terms of disability, Dr. Brigham determined 2% was appropriate based solely on the type of operation Mr. Clark had on his knee. Due to the initial tear and subsequent surgery, Mr. Clark is at increased risk for a future meniscus tear.

Mr. Memana S. Abraham
EX 15, EX 16, and EX 17

On February 22, 2002, Mr. Abraham, a certified rehabilitation counselor, prepared a transferrable skills report. He first noted Mr. Clark had a high school education with some vocational training. His work history included shipfitting, construction and electrical work. Mr. Abraham also reviewed Mr. Clark's medical issues including low back pain, dysfunctional shoulder, surgically

resolved carpal tunnel, and bilateral knee problems. Dr. Eriksson limited Mr. Clark to light duty work. Next, Mr. Abraham identified several transferable skills that Mr. Clark possessed: ability to read and interpret blueprints; effective communication and interaction with others; ability to weld and fabricate; ability to organize; and knowledge of carpentry and electrical systems. Finally, based on these skills, Mr. Abraham applied these skills to occupations and found numerous job (carpenter to electronic technician to garage supervisor) that were "good" matches. The lowest average weekly wage associated with these occupations was about $323. Mr. Abraham also identified numerous occupations that were a "fair" match for his skills (gate guard to salesperson to picture framer). The lowest average weekly wage for the "fair" matches was about $289.

Based on information from January 20, 2002 to February 25, 2002, and considering Mr. Clark's medical limitations (no lifting greater than 20 pounds and no repetitive overhead work), his vocational background, and transferrable skills, Mr. Abraham developed a labor market survey from three principal sources. First, he summarized local newspaper ads which showed over 50 job opportunities ranging from service coordinator, to yard security, to cashier, to driver. The summarized listings did not present wage information. Second, Mr. Abraham reviewed the local area job bank and found 7 job opportunities. These positions ranged from cashier at $6.00 per hour to security officer at $7.50 per hour, to loss prevention specialist at $9.00 per hour. Third, Mr. Abraham identified 5 specific job openings. These jobs involved sales, assistant store manager, and part counter sales. The lowest average weekly wage indicated was $350. A few employers indicated a willingness to provide training.

In a May 21, 2002 deposition, Mr. Abraham explained that in developing the labor market survey, he first considered numerous factors relating to Mr. Clark, such as vocational background, medical issues, and transferable job skills. Concerning medical issues, he relied principally on Dr. Eriksson's July 30, 2001 opinion that Mr. Clark was capable of light duty. Mr. Abraham then used the following three sources to identify job openings: direct employer contact, classified ads from local newspapers, and the America Job Bank. At the time he contacted employers, each of the five indicated employers had jobs available. Through this process, he identified about 64 jobs ranging from $400 to $500 in weekly salary. Some of Mr. Clark's contact notes verify that job openings did exist. Those types of jobs continue to be available in the local area.

In his direct contact with employers, Mr. Abraham did not specifically discuss Mr. Clark's qualifications. He just asked general questions. When an employer indicates a willingness to train, Mr. Abraham believes prior experience is not so important. Mr. Abraham did not contact the employers listed in the want ads. Some of those ads may be duplicative. The hourly pay for most of the employment in the job bank ranged from $6 to $9. Since full time is considered 30 hours a week or greater, some jobs listed as full time may actually involve working less than 40 hours per week.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations of Fact

At the hearing, the parties stipulated to the following facts: a) on August 25, 2000, an employer-employee relationship existed between the parties; and b) the appropriate average weekly wage is $713.13, with a corresponding weekly compensation rate of $475.42.

Issue No. 1 - Timely Notice

Under Section 12 (a) of the Act, a claimant must give notice of an injury within 30 days after the claimant becomes aware of the relationship between the injury and his employment.[9] However, according to Section 12 (d) (1) and (2), if an employer does not receive written notice of the claimant's injury, the claim is not barred if either the employer had knowledge of the injury within the prescribed time period or has provided no persuasive evidence to establish it was prejudiced by the lack of written notice. *See Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986) (Decision and Order on Reconsideration), *modifying* 18 BRBS 1 (1985). Additionally, the employer bears the burden of proving by substantial evidence that it was unable to investigate effectively some aspect of the claim due to the claimant's failure to provide timely notice as required by Section 12. *Strachen Shipping Co. v. Davis*, 561 F.2d 969 (5th Cir. 1978), *rev'g*, 2 BRBS 272 (1975) and *Williams v. Nicole Enterprises*, 21 BRBS 164 (1988). An allegation of difficulty in investigating a claim, standing alone, is not sufficient to establish the requisite prejudice. *Williams v. Nicole Enters.*, 21 BRBS 164 (1988).

As a defense against any claim by Mr. Clark concerning his right knee, the Employer asserts Mr. Clark failed to provide the requisite timely notice concerning his right knee injury. Regardless whether the date of injury is August 25, 2000 or September 3, 2000, Mr. Clark did not file his notice of injury until November 28, 2000 (CX 1), well beyond the thirty days of either date required under the Act. Questioning Mr. Clark's credibility, the Employer suggests significant doubt exists about his purported call to BIW about the knee injury a few days after September 3, 2000. Further, the Employer claims the delay was prejudicial in this case because causation is a central issue.

While he did not provide written notice until November 28, 2000, Mr. Clark testified that within a few days after his knee gave out on September 3, 2000, he did contact Mr. Nadeau, told him about the right knee, and asked whether BIW would cover a doctor's visit.

As a first step in resolving this issue, I must determine the date of injury. Because Mr. Clark is basing his claim on the accumulated damage to his knee from his period of work at BIW, the associated date of injury occurs when the long term damage became manifest and Mr. Clark was aware of the relationship between his right knee problem and employment. *See Travelers Insurance*

[9]Mr. Clark's right knee problem has characteristics of an occupational disease in that his right knee problem was cumulative during the period of his employment rather than due to a traumatic injury. Under Section 12 (a), a claimant is given up to one year to provide notice to an employer of an occupational disease. Because Mr. Clark is able to satisfy the more stringent 30 day requirement, I need not decide whether the occupational disease time limits are applicable.

Co. v. Cardillo, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955) and *Thorud v. Brady-Hamilton Stevedore Co., et. al.*, 18 BRBS 232 (1987). Although Mr. Clark had experienced "achy" knees during his work, his right knee did not become problematic until it went out on him on September 3, 2000. Based on his experience with his left knee, and considering the nature of his work, Mr. Clark came to believe on that day that his unstable right knee was due to his employment. Additionally, by September 6, 2000, Dr. Eriksson seemed to share Mr. Clark's belief that his work had contributed to his right knee problems. As a result, I find that on September 3, 2000, the nature of Mr. Clark's right knee condition became manifest and he was aware of the possible connection between work and his right knee problem.

Although my finding on timely notice does have to rely on Mr. Clark's testimony and a corresponding credibility determination, I did find him to be a credible witness. I have considered the various inconsistencies in his testimony, and other documents, such as his Notice of Claim, and a medical note for a treatment of right knee effusion in 1995 highlighted by the Employer's counsel. However, I found his demeanor to be truthful and do not attribute any consistency shortfalls to deliberate misrepresentations.[10] Consequently, based on his un-rebutted credible testimony, I find Mr. Clark contacted Mr. Nadeau of BIW within a few days of September 3, 2000, thus providing BIW with timely notice of his injury.

Even if Mr. Clark had not testified, the timeliness of his injury notice is separately established by Mr. Nadeau and the BIW Health Department Records. In asserting Mr. Clark's notice was untimely, the Employer stresses Mr. Clark's written November 28, 2000 Notice of Injury, and a December 4, 2000 Notice of Controversion (EX 3), which contains Mr. Nadeau's representation that the Employer first became aware of the injury on November 29, 2000. However, the record contains another, and earlier, Notice of Controversion by Mr. Nadeau, dated October 2, 2000 (CX 4). In this document, Mr. Nadeau first reported the date of injury as September 3, 2000 and then indicated that the Employer was aware of the injury on September 29, 2000, clearly within 30 days of September 3, 2000! Since Mr. Nadeua's stamped signature appears on both documents, any dispute between the two Notices of Controversion is settled by the BIW Health Department medical case note, dated September 29, 2000, (CX 11) which documents Mr. Clark's claim that his right knee popped due to his many years of working on his knees. Thus, BIW was clearly aware of both Mr. Clark's claim of right knee injury and purported causation within thirty days of the day the right knee gave way. While some argument was made that August 25, 2000 was the date of injury, I again note that Mr. Clark's testimony about the timing of his knee popping is credible. Additionally, as a possible explanation for use of the August 25, 2000 date, when the BIW Health Department entry was made on September 29, 2000, Mr. Clark was still out on strike so his most recent employment date was August 25, 2000.

[10]For example, Mr. Clark testified that BIW let him go on November 3, 2000 after he brought in the work restrictions about his wrists. Yet, on his Notice of Injury (EX 1), Mr. Clark asserted that he had been out of work since November 3, 2000 due to his right knee problem. Inconsistent? Not necessarily. Notably, Dr. Eriksson informed BIW on November 2, 2000 that due to both Mr. Clark's right knee situation and numb hands he could not kneel or crawl and had to wear wrist splints (EX 10). The next day, BIW let Mr. Clark go.

Finally, even if Mr. Clark missed the 30 day threshold, I note that other than a claim of prejudice, the Employer has failed to provide substantial evidence of such prejudice in this case. Notably, Mr. Clark's claim does not involve a unique accident with perishable facts. Instead, the nature of Mr. Clark's right knee claim involves his repetitive work tasks as a shipfitter over the course of 12 years with BIW which the Employer could readily ascertain and verify from Mr. Clark's former supervisors.

In summary, for the reasons noted above, I have determined that September 3, 2000 is the date of injury for purposes of starting the timely notice clock. Mr. Nadeau and BIW Health Department records establish that the Employer was aware of Mr. Clark's right knee problem by September 29, 2000. Accordingly, Mr. Clark's notice of injury was timely under the Act.

Issue No. 2 - Causation

Under the Act, 33 U.S.C. § 902 (2), a compensable "injury" is defined as an accidental injury arising out of and in the course of employment. According to the Benefits Review Board ("BRB" or "Board") injury means some physical harm in that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F. 2d 152 (2d Cir. 1991). The fact that a claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. *Bath Iron Works Corp. v. White*, 584 F.2d 569 (1st Cir. 1978). If a claimant establishes the existence of an injury, as defined by the Act, and then provides evidence of the occurrence of a work-related accident that could have caused the injury, the courts and Benefit Review Board have interpreted Section 20 (a) of the Act, 33 U.S.C. § 920 (a), to invoke a presumption on behalf of a claimant that, absent substantial evidence to the contrary, the injury was caused by the clamant's work.

Section 20 (a) Presumption

On September 3, 2000, Mr. Clark's right knee gave way. Subsequent examination identified swelling in the right knee and an arthroscopy procedure eventually established a tear in the medial meniscus of the right knee. As result, I conclude something on September 3, 2000 went wrong in Mr. Clark's right knee to the extent that he had an injury under the Act. Additionally, based on the nature of Mr. Clark's work as a shipfitter which through 1999 had required extensive kneeling and crawling and even after his left knee surgery in May 1999 still required those activities 10% of the time, I conclude Mr. Clark was engaged in work-related activities that could have caused damage to his knee to the extent that Mr. Clark is able to invoke the presumption under Section 20 (a) that his right knee meniscus tear is work-related.[11]

Substantial Contrary Evidence

To rebut the Section 20 (a) causation presumption, the employer must present specific

[11]As further support of invoking the presumption, I note that even Dr. Brigham indicated the type of work Mr. Clark experienced at BIW may cause degenerative changes to the knee.

medical evidence proving the absence of, or severing, the connection between the bodily harm and the employee's working condition. *Parsons Corp. v. Director, OWCP (Gunter)*, 619 F.2d 38 (9th Cir. 1980). The U.S. Circuit courts have rendered different views on the extent of such evidence. In *Brown v. Jacksonville Shipyards, Inc.*, 554 F.2d 1075 (11th Cir. 1990), the U.S. Court of Appeals for the Eleventh Circuit required that the employer produce evidence which ruled out the possibility of a causal relationship between the claimant's employment and injury. On the other hand, in *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684 (5th Cir. 1999), the U.S. Court of Appeals for the Fifth Circuit rejected the "rule out" standard. Instead, according to that court, an employer must produce evidence that a reasonable mind might accept as adequate to support a conclusion that the accident did not cause the injury. That is, the employer must provide the kind of evidence a reasonable mind might accept as adequate to support a conclusion. *Travelers Ins. Co. v. Belair*, 412 F.2d 297 (1st Cir. 1969).

Guided by the First Circuit's reasonable mind standard, I find Dr. Brigham's medical opinion represents substantial contrary evidence. Specifically, in the absence of any documented evidence of degenerative changes to Mr. Clark's knee, Dr. Brigham considered Mr. Clark's experience of having his right knee pop out to be the cause of the meniscus tear. Since that incident did not happen at work, he concluded Mr. Clark's right knee problem was not work-related.

Causation Determination

Once the Section 20 (a) presumption is rebutted, it no longer controls the adjudication. *Swinton v. J. Frank Kelly, Inc.* 554 F.2d 1075 (D.C. Cir.) *cert. denied*, 429 U.S. 820 (1976). Instead, I must weigh all the evidence in the record and determine the causation issue based on the preponderance of the evidence. *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986). In that regard, the medical opinions of two board certified physicians, Dr. Eriksson and Dr. Brigham, address the cause of Mr. Clark's right knee meniscal tear.

Dr. Eriksson clearly believes the tear of the meniscus in Mr. Clark's right knee is work-related. In her first medical entry following Mr. Clark's knee problem on September 3, 2000, Dr. Eriksson first observed that Mr. Clark had similar instability problems in his left knee and eventually needed corrective surgery. She then stated, "I suspect the derangement is work-related." When Mr. Clark continued to experience a "catchy" right knee at the end of September 2000, Dr. Eriksson again mentioned Mr. Clark's previous problems with his left knee and on the status report to BIW she checked the block designating Mr. Clark's right knee problem as work-related. Following additional radiographic studies and another examination on November 1, 2000, Dr. Eriksson diagnosed a torn posterior horn medial meniscus, informed BIW the right knee derangement was work-related, and placed him on modified duty with kneeling and crawling restrictions. When Dr. Eriksson performed the right knee arthroscopic surgery in May 2001, she reported a torn posterior horn of the medial meniscus and repaired the damage by trimming and removing loose debris. As evident on her correspondence to BIW in September 2001 and February 2002, Dr. Eriksson continued to believe the right knee damage was work-related.

Just as clearly, Dr. Brigham believes the right knee meniscus tear is not work related. Upon his first evaluation of Mr. Clark's right knee problem in January 23002, Dr. Brigham suggested probable underlying degenerative changes to the right knee. But he deferred an opinion on causation until a complete medical record review and more detailed history from Mr. Clark became available. In April 2002, after he reviewed the entire medical record and again examined Mr. Clark's knee, Dr. Brigham found little evidence to support a conclusion that degenerative changes contributed to the right knee medial meniscus tear.

For two reasons, Dr. Brigham concluded Mr. Clark's right knee problem was not work-related. First, Dr. Brigham found no identifiable medical evidence, either in treatment notes, operative notes, or radiographic studies, to support a finding that Mr. Clark had degenerative changes in his right knee meniscus. Second, and importantly related due to the absence of evidence of degenerative changes, the September 3, 2000 right knee incident would be sufficient, by itself, to cause the meniscus tear. Consequently, Dr. Brigham concluded the knee incident on September 3, 2000, which did not occur at work, was responsible for the knee damage. As a result, the right knee meniscal tear was not work-related.

Due to this obvious conflict in medical opinion, I first must assess the relative probative weight the opinions by Dr. Eriksson and Dr. Brigham in terms of documentation and reasoning. As to the first factor, a physician's medical opinion is likely to be more comprehensive and probative if it is based on extensive objective medical documentation such as radiographic tests and physical examinations. *Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985). In other words, a doctor who considers an array of medical documentation that is both long (involving comprehensive testing) and deep (includes both the most recent medical information and past medical tests) is in a better position to present a more probative assessment than the physician who bases a diagnosis on a test or two and one encounter. Finally, in light of the extensive relationship a treating physician may have with a patient, the opinion of such a doctor may be given greater probative weight than the opinion of a non-treating physician. *See Downs v. Director, OWCP*, 152 F.3d 924 (9th Cir. 1998).

As Mr. Clark's treating physician, I have considered that Dr. Eriksson had the opportunity to develop extensive documentation and provide the most probative opinion on the issue of causation. However, her probative advantage based on documentation is significantly diminished considering that Dr. Brigham reviewed all her medical treatment notes concerning Mr. Clark's knees from 1991 through February 2002, in addition to her operative notes from the right knee operation (EX 20). He also evaluated the radiographic evidence and conducted two examinations of Mr. Clark's knees. As a result, in terms ondocumentation, and despite Dr. Eriksson status as treating physician, I conclude that both Dr. Eriksson and Dr. Brigham had an exceptional broad and deep documentary basis for their respective medical opinions.

The second factor affecting relative probative value, reasoning, involves an evaluation of the connections a physician makes based on the documentation before him or her. A doctor's reasoning that is both supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19

(1987). Additionally, to be considered well reasoned, the physician's conclusion must be stated without equivocation or vagueness. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988).

In light of these principles, and although documentation and treating physician status did not move me closer a determination of relative probative value of the conflicting medical opinion, consideration of reasoning does enhance the probative value of one physician's opinion on the causation of Mr. Clark's right knee damage. For the reasons discussed below, I find Dr. Brigham presented the better reasoned medical opinion in this case.

As noted above, Dr. Eriksson's first reaction in September 2000 to the cause of Mr. Clark's right knee problem was a stated suspicion that it was work-related. The apparent basis for that suspicion was the similarity between the symptoms Mr. Clark experienced with his left knee in 1999 which required corrective surgery and his present right knee situation. Sometime later, based on her "work-related" check mark on the BIW status report in November 2000, Dr. Eriksson's suspicion on causation had apparently become crystalized into a definitive conclusion. However, nothing in the record indicates the reasoning Dr. Eriksson used in definitively determining that Mr. Clark's work at BIW caused his right knee meniscal tear. After the September 6, 2000 speculative diagnosis of work-relatedness, Dr. Eriksson's opinion on causation is established solely by conclusive check marks on status reports.

The absence of any detailed explanation by Dr. Eriksson for her causation opinion is problematic for at least three reasons. First, while the circumstances surrounding the problems with Mr. Clark's left and right knee are similar, and that similarity appears to be a key factor to Dr. Eriksson, there are some distinctions. Other than a swollen knee due to a bump in 1995, Mr. Clark never suffered any significant trauma to his right knee at work In contrast, about a month before his left knee started locking up in January 1999, Mr. Clark did significantly injure his left knee in a fall at work. Additionally, for a major portion of his time at BIW prior to his left knee problem, Mr. Clark spent between 50% to, on occasion, 90% of his time kneeling and crawling. However, after the left knee surgery, Mr. Clark's lead man reduced his exposure to work requiring kneeling and crawling such that Mr. Clark was spending only about 10% of his work day kneeling and crawling in the months before his right knee locked up. Of course, the absence of any contemporaneous trauma to the right knee and less knee stress at work might also explain why Mr. Clark's right knee problems appeared later than the left knee issue. In other words, both the similarities and the distinctions between the two knees may or may not support a finding of causation. However, due to Dr. Eriksson's reasoning silence, I have no idea how she sorted through such factors and what medical evidence finally led to her apparent firm conclusion that Mr. Clark's right knee damage was due to his work at BIW.

Secondly, Dr. Eriksson's terse causation conclusion is further troublesome in light of Dr. Brigham's medical opinion that the stumbling incident of September 3, 2000, standing alone, could have caused the meniscus tear. Due to the lack of any documented reasoning on her process in finding the right knee damage work-related, I have no way of determining whether Dr. Eriksson even considered the possibility that some other incident, such as the knee giving way on September 3,

2000, may have torn the meniscus, let alone how she was able to exclude other possible causes.

Finally, the absence of in-depth causation reasoning by Dr. Eriksson becomes even more pronounced considering Dr. Brigham's observation that Dr. Eriksson's treatment and operative notes contain no findings of degenerative changes. In particular, as the surgeon who actually looked into Mr. Clark's right knee and saw the meniscus tear, Dr. Eriksson had an exceptional opportunity to identify the degenerative conditions of the knee that linked the tear to Mr. Clark's BIW work. Dr. Eriksson may have seen such damage, but due to the absence of any descriptive detail, I am unable to determine whether such changes existed. In other words, none of Dr. Eriksson's documentation mention the existence of the expected degenerative changes associated with an occupational cause for the meniscus tear.

In stark contrast, Dr. Brigham presented a well reasoned, and consequently more probative, medical opinion in which he explained in detail how he arrived at his conclusion that Mr. Clark's right knee meniscus tear was not work-related. As expected of a well reasoned medical opinion, Dr. Brigham clearly considered both possible causes of the right knee damage. Upon initial consideration of Clark's work and medical histories, Dr. Brigham was well aware of the work-related stress to Mr. Clark's knee, the symptoms involving both knees and his chronic knee problems. As a result, Dr. Brigham's first impression was that underlying degenerative changes may exist in Mr. Clark's right knee. However, as Dr. Brigham fully explained, his review of the complete medical record, including Dr. Eriksson's arthrosporic surgery findings, failed to provide any identified signs of degenerative changes to his right knee to support such a work-related causation conclusion. Absent such medical evidence of degeneration in the right knee, the other possible cause for the knee injury, the September 3, 2000 knee incident of the knee giving way, became the more likely cause of the meniscus tear.

Conclusion

Although Mr. Clark was initially able to invoke the causation presumption under Section 20 (a), the Employer responded with substantial contrary evidence which effectively eliminated the presumption in favor of Mr. Clark. As a result, the causation determination must be based on the preponderance of the more probative evidence in the entire record.

While working for many years at BIW, which entailed working on his knees, Mr. Clark experienced bilateral knee pain, developed an unstable left knee, and had surgical repair of a meniscal tear in 1999. When the same symptoms appeared in September 2000, both Mr. Clark and Dr. Eriksson concluded the right knee problem was work-related. Although Dr. Eriksson's opinion is well documented as the treating physician, Dr. Brigham has presented a similarly well documented and a much better reasoned medical opinion that Mr. Clark's right knee meniscal tear is not work-related. Due to Dr. Brigham's better explained medical opinion, the preponderance of the evidence in the record does not support a finding that the meniscus tear in Mr. Clark's right knee was related to his work at BIW. As a result, Mr. Clark has failed to carry his burden of proof concerning the cause of his injury. Accordingly, his claim for benefits under the Act for his right knee injury must

be denied.

Issue No. 3 - Nature and Extent of Disability

Although Mr. Clark's claim must be denied due to failure of proof, I will briefly address the nature and extent of disability issues presented in this cause. Under the Act, a longshoreman's inability to work due to a work-related injury is addressed in terms of the nature of the disability (permanent or temporary) and extent of the disability (total or partial). In a claim for disability compensation, the claimant has the burden of proving, through the preponderance of the evidence, both the nature and extent of disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985).

Nature

The nature of a disability may be either temporary or permanent. Although the consequences of a work related injury may require long term medical treatment, an injured employee reaches maximum medical improvement ("MMI") when his condition has stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978). In other words, the nature of the worker's injured condition becomes permanent and the worker has reached maximum medical improvement when the individual has received the maximum benefit of medical treatment such that his condition will not improve. *Trask*, 17 BRBS at 60. Any disability suffered by a claimant prior to MMI is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). If a claimant has any residual disability after reaching MMI, then the nature of the disability is permanent.

From the time Mr. Clark developed problems with his right knee in September 2000 until July 30, 2001 when Dr. Eriksson concluded Mr. Clark had sufficiently recovered from the knee surgery and had reached maximum medical improvement, the nature of any disability associated with the right knee was temporary. From July 30, 2001, Mr. Clark's right knee condition was permanent.

Extent

The question of the extent of a disability, total or partial, is an economic as well as a medical concept. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). The Act defines disability as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of injury in the same or other employment. *McBride v. Eastman Kodak Co.*, 844 F.2d 797 (D.C. Cir. 1988). Total disability occurs if a claimant is not able to adequately return to his or her pre-injury, regular, full-time employment. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984). A disability compensation award requires a causal connection between the claimant's physical injury and his or her inability to obtain work. The claimant must show an economic loss

coupled with a physical and/or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, a claimant may be found to have either suffered no loss, a partial loss, or a total loss of wage-earning capacity. Additionally, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachen Shipping v. Nash*, 782 F.2d 531 (5th Cir. 1986).

The determination of the extent of Mr. Clark's disability in relation to his right knee starts with a finding that prior to September 2000, even with the benevolence of the lead man, Mr. Clark's work at BIW still required him to work on his knees about 10% of the time. As a consequence, when Dr. Eriksson imposed a no kneeling restriction on Mr. Clark's work profile, he was not able to return to his regular or usual employment due to his knee problem. Thus, his associated disability became total and remained so based on Dr. Eriksson's work restriction until Mr. Abraham provided information showing the availability of suitable work for Mr. Clark in the local area as of January 20, 2002. Although some dispute arose about the amount of Mr. Clark's residual earning capacity, the labor market survey showed sufficient suitable job opportunities in the local area to establish he had some ability to earn a wage. As a result, his loss of income earning capacity changed from total to partial.

Based on Dr. Eriksson's determination of maximum medical improvement and Mr. Abraham's labor market survey, as of January 20, 2002, Mr. Clark had a permanent partial disability associated with his right knee. Had Mr. Clark been able to establish causation, that permanent partial disability would have been compensable under the permanent partial disability schedule in Section 8 (c), 33 U.S.C. § 908 (c), reduced proportionally for the 2% loss of use of the right lower extremity based on Dr. Brigham's assessment.

ORDER

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order:

The claim of Mr. Lance E. Clark for disability benefits under the Act is **DENIED**.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: April 10, 2002
Washington, D.C.

Attachment No. 1

American Board of Medical Specialties

Certification:

Ann I. Eriksson, MD
Norway, Maine

Certified by: The American Board of Orthopaedic Surgery
General Certificate: Orthopaedic Surgery

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